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17, 1968 (Pet. 62–63). The petition for a writ of certiorari was filed on April 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly held that cards signed by a majority of the employees in a collective bargaining unit which authorized the union to represent the employees for bargaining purposes established the union's representative status, where the union solicitors, although indicating that the cards could be used for a Board representation election, did not represent that the cards would be used only for that purpose.

2. Whether substantial evidence supports the Board's finding that the employer's refusal to recognize and bargain with the union was not motivated by a good faith doubt as to the union's majority status.

3. Whether the Board properly exercised its remedial authority in ordering the employer to bargain with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix D to the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. In May 1962, the Union[2] commenced an organizing campaign among the employees at the Company's

[2] United Electrical, Radio and Machine Workers of America (UE) Local 218. The Union was the charging party before the Board, intervened in the court below, and is a party here.

Springfield, Vermont, plant, and by August 14, it obtained signed authorization cards from 198 of the Company's 337 production and maintenance employees (J.A. 664–665).[3] The cards stated (J.A. 726, 752):

> I hereby request and accept membership in the above named Union and authorize it to represent me, and in my behalf to negotiate and conclude all agreements as to hours of labor, wages, and all other conditions of employment.

The Union immediately notified the Company by letter that it represented a majority of the Company's production and maintenance employees and requested recognition and an early bargaining conference (J.A. 664; 69, 244–245, 419). Having received no reply from the Company by August 16, the Union filed a representation petition with the Board (J.A. 665; 419–420, 133–136). On August 17, the Company notified the Union by letter that, in accordance with its "very definite policy," it would decline to recognise the Union in the absence of Board certification (J.A. 665; 70, 428–429, 420). The Company also mailed a copy of that letter to each employee, together with a statement expressing the Company's view that the question of

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[3] International Union Representative Harley explained at the first organizational meeting and at several other meetings that the Union was attempting to obtain signed authorization cards from a majority of the employees and that, once it did, there were four ways in which the Union might obtain recognition by the Company: (1) by voluntary recognition upon the Union's demand; (2) by a Board bargaining order following unfair labor practices, if the Company committed any; (3) by picketing; or (4) by an election if the Company forced the Union to prove its majority (J.A. 727; 303–305). At no time did Harley tell the employees that the only purpose of signing the card was to get an election (J.A. 306, 310, 635).

recognition "must be decided by secret ballot" and that to "take an outside Union's word * * * is *not* the American way" (J.A. 666; 84–85). The Company then embarked on a campaign of vigorous opposition to the Union, which included the unfair labor practices described below.[4]

2. During the pre-election period, several Company supervisors interrogated employees concerning their attitudes toward the Union and threatened reprisals, as shown by the following examples (see J.A. 666–674). Supervisor Elwin Barber conducted merit rating interviews with about 30 of the employees in his department, during which he asked each employee what he thought the Union could do for him that the Company could not do directly (J.A. 667–668; 260–263, 582, 583, 278, 279). Foreman Rice persisted in asking employee Losee if he had signed a card despite Losee's protestation that it was none of Rice's business (J.A. 673; 235–236). Foreman Belaire not only asked employees about the Union's progress (J.A. 673–674; 200, 213), but told employee Bashaw that, if the Union came in, the Company could not transfer him to a different assignment and would therefore have to send him home if work were slack (J.A. 677–678; 213–215). Belaire and Superintendent Lester also expressed surprise that Bashaw was listed as a member of the Union's orga-

[4] The Company also issued numerous letters and notices to the employees expressing its opposition to the Union. As one such notice stated: "WE WILL AVOID TAKING ON THIS ADDED BURDEN [i.e., the Union] BY USING EVERY LEGAL, MORAL, AND INTELLIGENT MEANS AT OUR DISPOSAL" (J.A. 666, 721; 105).

nizing committee, and Lester asked him, "Do you like your job?" (*ibid.*).

On October 9, General Manager Leyds met with several groups of employees and announced an increase in the Company's pension plan, to become effective on January 1, 1963 (J.A. 696; 291–292, 433–434). On the following day, the Company placed a full page advertisement in the local newspaper which referred to the "generous increases" in pensions and stated (J.A. 696–697):

> Consider how Bryant has invested here this year. Then ask yourself, "How much has the U–E invested?" A vote for Bryant is a vote for your family's security. It didn't take a union to get where we are, and it won't take one to get where we're going.
>
> VOTE "NO"—GROW AND GO WITH BRYANT

A few days prior to the Board election on November 1, Company Treasurer Bush informed the employees of additional pension benefits, also to become effective on January 1, 1963 (J.A. 262, 697; 296–297, 293–294). A Company notice issued on the day preceding the election urged employees to vote against the Union and to remember "what you've earned in wages and other benefits without a union" (App. 7 n. 9; J.A. 762 n. 9, 697–698, 293–296, 74–82, 120–124).

3. On November 1, the Union lost the Board election, 184 to 124 (J.A. 651; 44). The Union filed objections, asserting that the Company's unlawful conduct had affected the results of the election (J.A.

651).[5] On January 3, 1963, the Union filed unfair labor practice charges, and a complaint was issued on June 10, 1964.[6]

On July 13, 1964, about two weeks before the unfair labor practice hearing was scheduled to begin, the Company posted a notice on its bulletin board which stated that the Board and the Union were attempting to interview employees in order to build a case against the Company, and that, while it was the employees' privilege to help them, the employees were under no obligation to provide this assistance or even talk to the investigators (J.A. 701–702). The notice also alleged that the Board was "joining forces with the Union to force you to accept the Union as your bargaining agent without a secret vote." It concluded:

> The issue in this case is whether people who have signed union cards are entitled to express their freedom as citizens in a free election. In deciding whether or not to assist in the inves-

[5] The Regional Director, finding merit to some of the objections, set aside the election on December 18, 1962. On June 8, 1964, the Union withdrew its representation petition because of the pendency of the unfair labor practice proceeding (J.A. 651 & n. 1).

[6] The Regional Director originally declined to issue a complaint on the charges because the Company agreed to enter into a settlement agreement with respect to the allegations that it had violated Section 8(a)(1) of the Act (J.A. 651–652; 43–61). The Union, which opposed the settlement, appealed to the General Counsel of the Board. By letter of May 22, 1964, the parties were informed by the General Counsel that the Union's appeal had been sustained (J.A. 652; 30–31). Accordingly, on June 10, 1964, the Regional Director withdrew his approval of the settlement agreement, and issued the complaint giving rise to the instant proceeding (J.A. 652; 1–8).

> tigation, think what your decision will mean to your own right and the right of your fellow employees to a secret ballot election.

On July 24, four days prior to the hearing, the Company called a meeting of its employees at which it suggested that some of them who had signed a union card might have thought that they were signing only to get an election (J.A. 703–704; 499, 516–517, 503–504, 226–229, 243, 559, 370). After the meeting each employee was individually questioned by two Company lawyers as to the circumstances surrounding the signing of the union authorization cards—e.g., "Were you told that the purpose of signing the card was to get an election?" "Were you told at any time that the Union would use your card to establish a Union in the plant without any election?" (J.A. 704–706; 228–230, 323, 206–207).

On August 5, while the Board hearing was in progress, the Company posted a notice calling attention to "a ruling by the N.L.R.B. in Washington that the Company could cross-examine witnesses on the circumstances surrounding the signing of the union cards" (J.A. 710, 71).[1] The notice added (*ibid.*):

> From interviews with employees conducted shortly before the Hearing while the Company was preparing its defense, many employees

[1] The Trial Examiner had ruled that witnesses called by the General Counsel for the limited purpose of authenticating their signatures on authorization cards could not be cross-examined as to the circumstances under which their signatures were obtained; the Company would have had to take such witnesses as its own if it wished to establish the existence of fraud, duress, or mis-

stated that they signed the cards in order to get an election.

Company counsel held another interview with many of the employees prior to cross-examination and again asked them, "Were you told that the purpose of signing the card was to get an election?" (J.A. 711–713; 355–357, 379–380, 371). And during a temporary recess in the hearing, prior to the completion of the cross-examination, the Company issued a statement to the local newspaper stating that it had called several employees as witnesses—"many of them testifying that they had been told the cards were to obtain a union election and not to bring the Union in without an election" (J.A. 713–714).

B. THE BOARD'S DECISION AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by announcing improvements in its pension plan, threatening reprisals, and coercively interrogating employees in order to induce them to abandon their support for the Union (App. 6–7; J.A. 761–762, 677, 678, 698). The Board also concluded that the Company violated Section 8(a)(1) by coercively interrogating employees with regard to testimony they might be called upon to give at the

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representation. The Company appealed to the Board, which ruled on August 4 that the Company would be permitted to show on cross-examination "the circumstances surrounding the signing of the cards by the witnesses including what was said at that time, but may not elicit any testimony as to what the witnesses may have thought at the time." (App. 3, n. 2; J.A. 758–759, n. 2, 713–714, n. 31.)

unfair labor practice hearing,[8] and by encouraging them not to cooperate with the Board agents in the investigation and conduct of the proceeding (App. 3; J.A. 759, 721–722, 724). The Board also found that the Union had valid authorization cards signed by a majority of the employees when it sought recognition from the Company,[9] and that the Company declined recognition not because of a good faith doubt as to the Union's majority status, but in order to gain time to dissipate its status. Accordingly, the Board held that the Company violated Section 8(a)(5) and (1) by refusing to bargain with the Union. (App. 8; J.A. 762–763, 744, 746–747.)[10] The Board ordered the Com-

[8] The Board found that the initial questioning of employees on July 24 was permissible because it was necessary for the preparation of the Company's defense. The Board found, however, that the second interrogations were not privileged, because they were only intended to impress upon the employees the importance of testifying affirmatively to the leading question—"were you told that the purpose of signing the union card was to get an election"—rather than to elicit new information (J.A. 719–722).

[9] The Board applied the principle (see *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (C.A. 6)) that, since the cards unequivocally authorized the Union to act as collective bargaining agent, they must be treated as valid authorizations absent probative evidence showing that, before they signed the cards, representations were made to the employees by the Union solicitors that the cards would be used only for a Board election (J.A. 726–727, 734, n. 42). The Board found that, except for the possible exception of two cards, the cards obtained by the Union were not tainted by misrepresentation or other impropriety, and that the Union thus had a clear majority of 196 out of 337 employees in the unit on August 14, 1962, when it requested recognition (J.A. 743–744).

[10] Member Jenkins dissented on this aspect of the case because of the delay, discussed *infra*, pp. 13–14 (App. 11–13; J.A. 765–767).

pany to cease and desist from the unfair labor practices found and from interfering with employee rights in any like or related manner, and to bargain with the Union upon request (J.A. 749–751).[11]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's findings that the Company had engaged in coercive acts in violation of Section 8(a)(1) (Pet. 32–34).[12] In addition, a majority of the court (Judge Anderson dissenting) sustained the Board's findings that the Union represented a majority of employees when it requested recognition and that the Company's refusal to bargain was not in good faith, and enforced the Board's bargaining order (Pet. 34–36, 41–44, 37, n. 1).

ARGUMENT

1. The first question presented—whether cards which unambiguously authorize the union to represent the signers for purposes of collective bargaining may be invalidated by a showing that the solicitors indicated the cards may be used to obtain a Board representation election and some of the employees believed that they would serve only that purpose—involves the validity of the Board's *Cumberland Shoe* rule, 144 NLRB 1268 (see n. 9, *supra*). This is the same issue

[11] The bargaining order was prescribed not only as a remedy for the Company's refusal to bargain, but also as a remedy for the Company's other unfair labor practices (App. 9; J.A. 763–764).

[12] A majority of the court, however, found that the Board was unjustified in predicating an unfair labor practice finding on the Company's action in reinterviewing the employees between their direct and cross-examination (Pet. 34).

which the Board raised in its petition for certiorari in *National Labor Relations Board* v. *Crawford Manufacturing Co.*, which the Court denied on April 22, 1968, No. 1050, this Term. Although we continue to believe, for the reasons set forth in our petition in No. 1050, that the issue warrants resolution by this Court, this case is not an appropriate vehicle for such review.[13]

While both Judge Hays and Judge Friendly upheld the Board's determination that the Union had established its majority status on the basis of the authorization cards, they apparently disagreed as to the standard by which evidence of Union misrepresentation should be tested. Judge Hays, who did not refer to *Cumberland Shoe* in his opinion, stated that the "evidence credited by the Board, and therefore accepted by us * * * established that the union's organizers made no misrepresentations to the employees as to the purpose of the cards and the effect of their signatures. * * * [A]t no time were the employees told that the sole purpose of signing the cards was to secure an election" (Pet. 34–35). Judge Friendly stated (Pet. 37–38) that in the *Nichols* case[14] the Second Circuit recently had "rejected" the *Cumberland Shoe* "rule * * * that an authorization card 'clear' on its face could be invalidated for misrepresentations as to its purpose only by proof that the solicitor had said that the 'sole' purpose of the card was to secure an NLRB

[13] The same issue is raised in the petition for certiorari in *Preston Products Co.* v. *National Labor Relations Board*, No. 1367, this Term. The Board is not opposing the petition in that case.

[14] *National Labor Relations Board* v. *S. E. Nichols Co.*, 380 F. 2d 438 (C.A. 2).

conducted election; we held that cards were invalid if 'signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election.'" Although Judge Friendly agreed with Judge Anderson's dissenting opinion that "a considerable number of cards must be invalidated for proven misrepresentations by solicitors" (Pet. 41), he concluded that the number of cards as to which such misrepresentation had been shown was not sufficient to defeat the Union's majority (Pet. 41–44).

This case, therefore, does not present the issue of the validity of the Board's *Cumberland Shoe* rule. For, even if the Second Circuit's *Nichols* standard represents a substantial departure from *Cumberland Shoe* as it has been applied by the Board and by other circuits, petitioner's claim of Union misrepresentation is insufficient under either standard to invalidate a majority of the cards. Thus, even were the Court to reject *Cumberland Shoe* and adopt the *Nichols* test, that would not change the outcome of this case.

2. Petitioner further contends (Pet. 22–26) that the court below erred in sustaining the Board's finding that its refusal to recognize the Union was not motivated by a good faith doubt as to the Union's representative status.[18] Although Judge Hays concluded

[18] Absent such good faith doubt, an employer violates Section 8(a)(5) of the Act where he refuses to recognize and bargain with a union which in fact represents a majority of his employees in an appropriate unit. See *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A. D.C.), certiorari denied, 341 U.S. 914.

that petitioner's lack of good faith was evidenced by its failure to suggest a check of the authenticity of the Union's cards, by its efforts to undermine the Union through extensive acts of restraint and coercion violative of Section 8(a)(1), and by its express refusal to accept any evidence of representative status other than a Board certification (Pet. 35)—whereas Judge Friendly found that only the last factor was probative of petitioner's lack of good faith (Pet. 37, n. 1)—, there is no cause for further review of this factual issue. Even under Judge Friendly's more restrictive view, which petitioner apparently does not challenge, there is substantial evidence to support the Board's finding of lack of good faith.[16]

3. Finally, the court below correctly rejected petitioner's contention (Pet. 26–29) that the Board's bargaining order was an inappropriate remedy by reason of the delay in obtaining a ruling from the General Counsel[17] and in processing the case through

[16] While an employer who in good faith doubts the reliability of authorization cards may insist upon a Board election (see Pet. 24–25), the Company asserted that, irrespective of what proof the Union adduced to show that it represented a majority of the employees, the Company was not obligated to recognize it unless and until it had been certified after a Board election. This position is contrary to settled law. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8; *Jas. H. Matthews & Co.* v. *National Labor Relations Board*, 354 F. 2d 432, 436 (C.A. 8), certiorari denied, 384 U.S. 1002.

[17] There was a 15-month period between the Union's appeal to the General Counsel from the Regional Director's refusal to issue a complaint and the General Counsel's ruling (n. 6, *supra*). The Board found that the General Counsel was await-

the agency. This Court rejected a similar contention in *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16, stating: "Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)." See also *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U.S. 512; *National Labor Relations Board* v. *Progressive Mine Workers*, 375 U.S. 396.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1968.

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ing the outcome of another case, then pending before the Board, which would control the disposition of the present case, and that, in these circumstances, his action was reasonable (App. 4–5; J.A. 759–760).

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